No. 79-6624

FILED
JUL 19
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

OFFICIAL COPY

HUMBERTO ROSALES-LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN F. DePUE
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6624

HUMBERTO ROSALES-LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the trial judge erred in refusing to question the jurors concerning possible bias against persons of Mexican descent.

2. Whether it was proper for a substitute judge, who did not preside at the trial, to impose sentence upon petitioner.

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 617 F.2d 1349.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1980. A petition for rehearing was denied on May 12, 1980 (Pet. App. B), and the petition for a writ of certiorari was filed on May 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiracy to conceal, harbor, shield, and illegally transport aliens, in violation of 18 U.S.C. 371 (Count 1); three counts of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(2) (Counts 2-4); and three counts of concealing, harboring, and shielding aliens, in violation of 8 U.S.C. 1324(a)(3) (Counts 5-7). He was sentenced to consecutive terms of eighteen months' imprisonment on the conspiracy count and five years' imprisonment on each of the substantive counts; however, the sentences on the substantive counts (Counts 2-7) were suspended in favor of a term of five years' probation to commence following petitioner's release from custody. The court of appeals affirmed (Pet. App. A).

As summarized by the court below (Pet. App. A, 2397-2398), the evidence showed that, during the night of December 10-11, 1978, three aliens, led by an unidentified guide, left Tijuana, Mexico, on foot and unlawfully crossed the international border into the United States. Following the crossing, the guide transported the aliens by automobile to the Imperial Beach residence of co-defendant Virginia Bowling, where petitioner admitted them into the garage.

Thereafter, petitioner concealed the aliens and their guide in the trunk of an automobile. Bowling then drove the vehicle containing the illegal aliens north on Interstate Five through the San Clemente checkpoint while petitioner followed in another vehicle. Once beyond the checkpoint, Bowling and petitioner exchanged automobiles, and the guide drove the vehicle containing the concealed aliens to Los Angeles. Upon arriving in Los Angeles, the aliens were released from the trunk, and petitioner instructed them to enter an apartment where they were met by co-defendants Falcon-Zavala and Flores. At approximately noon on December 11, Flores departed in an automobile with two of the aliens, and petitioner, Falcon-Zavala, and the third alien left the apartment in another automobile. Shortly thereafter, agents of the Immigration and Naturalization Service, who had followed petitioner from the Bowling residence to Los Angeles and had maintained surveillance of the apartment, stopped the two automobiles and arrested petitioner and his cohorts.

ARGUMENT

1. Petitioner is a resident alien of Mexican descent. Relying on Ristaino v. Ross, 424 U.S. 589 (1976) and Aldridge v. United States, 283 U.S. 308 (1931), he contends (Pet. 3-5) that the trial court committed reversible error when it refused to ask prospective jurors whether they would "consider the race or Mexican descent of [petitioner] in [their] evaluation of this case" (R. Doc. 11 at 2; Tr. 157; Pet. App. 2399, n.1). This claim is unfounded.

In Ristaino, a black defendant was convicted in state court of assaulting a white security guard. Although this Court ruled that the state trial judge was not constitutionally required to conduct voir dire questioning specifically directed to uncovering racial prejudice, the Court stated that, in the exercise of its supervisory power, it would have required a federal court under the same

circumstances to inquire into racial prejudice at the request of the defense (424 U.S. at 597 n.9). In Aldridge v. United States, supra, the Court exercised its supervisory power in reversing the conviction of a black defendant sentenced to death for the murder of a white police officer where the federal trial court had refused the defendant's request that the jurors be questioned about racial prejudice. See Ristaino v. Ross, supra, 424 U.S. at 598 n.10.

Neither Ristaino nor Aldridge requires reversal here. As the court of appeals properly concluded (Pet. App. A, 2400), "the facts of Ristaino presented a greater likelihood of prejudice than do the facts of the present case," and petitioner's Mexican heritage therefore "did not, in and of itself, require the court below to pose a question on racial prejudice to the venire." Ristaino and Aldridge involved interracial crimes of violence against a security guard and a police officer. The instant case, on the other hand, involved a victimless crime, and there is no evidence that the trial was charged with any racial or ethnic overtones. See United States v. Polk, 550 F.2d 1265, 1267 (10th Cir.), cert. denied, 434 U.S. 838 (1977); United States v. Perez-Martinez, 525 F.2d 365, 367 (9th Cir. 1975).

The greatest potential for prejudice at petitioner's trial resulted from the allegation that petitioner harbored and transported illegal aliens in a locality where such activities are a particularly sensitive issue. However, the trial judge not only inquired generally whether the members of the venire knew of any reason why they could not sit as fair and impartial jurors (Tr. 151), but specifically asked whether their attitudes toward illegal aliens would affect their impartiality (Tr. 146-147), and two jurors were excused on that basis. Thus, petitioner was adequately protected against any juror bias arising from the nature of the charges against him.

Nor does the decision below conflict with those decisions which require inquiry into possible racial prejudice whenever the accused is a member of a racial minority. See, e.g., United States v. Williams, 612 F.2d 735, 736-737 (3d Cir. 1979), cert. denied No. 79-6109 (Mar. 17, 1980); United States v. Bowles, 574 F.2d 970, 972-973 (8th Cir. 1978); see also United States v. Bell, 573 F.2d 1040, 1042-1043 (8th Cir. 1978). 1/ Each of these cases involved an ascertainable racial minority, such as blacks. This, however, is not such a case; petitioner's proffered bias inquiry was not based upon the fact that he was a member of a minority race but upon his Mexican ancestry. As the court noted in United States v. Perez-Martinez, supra, 525 F.2d at 368 & n.4, national origin is fundamentally different from race, and there is no reason to treat these two concepts alike for purposes of reviewing a trial court's conduct of the jury voir dire. Thus, while a number of courts have held that a defendant is entitled to an inquiry concerning prejudice against members of his race without demonstration of special circumstances, these decisions do not necessarily mandate queries concerning biases on account of a defendant's ethnic background or national origin, and they are not inconsistent with the decision of the court below.

The purpose of the voir dire examination is to preserve the right to trial by a competent and impartial jury. The scope of examination necessary to achieve this purpose rests in the broad discretion of the trial judge, as this Court has repeatedly held. See Ristaino v. Ross, supra, 424 U.S. at 594-598; Aldridge v. United States, supra, 283 U.S. at 310; see also Ham v. South Carolina, 409 U.S. 524, 527-528 (1973); Fed. R. Crim. P. 24(a). Petitioner has

---

1/ Compare United States v. Polk, supra; United States v. Perez-Martinez, supra; United States v. Walker, 491 F.2d 236, 239 (9th Cir.), cert. denied, 416 U.S. 990 (1974).

failed to demonstrate an abuse of the trial court's discretion in the circumstances presented here.

2. Petitioner was tried before Judge Howard F. Corcoran, a visiting judge from the United States District Court for the District of Columbia. After the guilty verdict was returned, Judge Corcoran refused to impose sentence upon petitioner until a presentence report was completed (Tr. 594-598). Judge Corcoran's temporary assignment ended before the completion of the presentence report, and petitioner was sentenced by Judge Gordon Thompson, of the Southern District of California. This procedure was wholly proper, petitioner's contrary contention (Pet. 5-8) notwithstanding.

On its face, Rule 25(b), Fed. R. Crim. P., unambiguously provides that "[i]f by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties * * *." 2/ This rule authorizes a district judge who did not preside at trial to impose sentence when the presiding judge is unable to perform that duty due to absence. See, e.g., United States v. Ortiz, 603 F.2d 76, 81 (9th Cir. 1979), cert. denied, No. 79-5513 (Jan. 7, 1980); United States v. McCallie, 554 F.2d 770, 773-774 (6th Cir. 1977) (collecting cases). As the court below observed (Pet. App. A, 2403), Judge Thompson was familiar with this case because he had read the presentence report and had presided over certain pretrial matters; accordingly, Judge Thompson was fully

---

2/ Nothing in the language of Rule 25(b) supports petitioner's suggestion (Pet. 8) that it is impermissible for a judge, other than the judge who presided over the trial, to impose sentence when the defendant objects to such a substitution.

qualified to impose sentence upon petitioner. Moreover, the sentence itself can hardly be viewed as an abuse of discretion, since petitioner was sentenced to 18 months' imprisonment on the conspiracy count, the sentences on the six substantive counts having been suspended in favor of five years' probation (Sent. Tr. G-I). 3/

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN F. DePUE
Attorney

JULY 1980

3/ Petitioner mistakenly contends (Pet. 7) that the decision of the court below conflicts with United States v. Bowser, 497 F.2d 1017 (4th Cir.) cert. denied, 423 U.S. 997 (1974). In Bowser, the court acknowledged that a judge other than the judge who presided over the trial is empowered to impose sentence. However, it remanded the case for resentencing by the judge who initially imposed sentence because of his unexplained imposition of the maximum sentence despite the absence of any aggravating factors. In those circumstances, the court of appeals concluded that the sentencing judge may have failed to exercise any discretion. Id. at 1019-1020. Here, by contrast, the sentencing judge, who was familiar with the case, suspended all except 18 months of the sentence of imprisonment, even though petitioner could have received consecutive sentences on all seven counts aggregating 35 years' imprisonment.

Finally, there is no merit to petitioner's contention (Pet. 6) that the sentence he received was impermissibly disproportionate to the sentences imposed upon his co-defendants. While it is true that co-defendants Falcon-Zavala and Bowling received more lenient sentences than petitioner, they each pleaded guilty to one count and cooperated by testifying for the government at petitioner's trial. In contrast, petitioner was convicted on all seven counts of the indictment. Moreover, petitioner's attempt to minimize his role in the alien smuggling ring is misleading. Co-defendant Bowling testified that pursuant to an arrangement she had with petitioner, she and petitioner would split the money equally after petitioner had paid the guide (Tr. 369). Co-defendant Falcon-Zavala testified that while he was merely a driver receiving $7 per person for transporting illegal aliens (Tr. 423, 446), petitioner sometimes acted as a guide, and collected payments from the families of the illegal aliens (Tr. 434, 451-452).